No. 2880

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 8

Northern District of California.

BLUE GOOSE MINING COMPANY
(a corporation),
Plaintiff in Error,

vs.

NORTHERN LIGHT MINING COMPANY
(a corporation),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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Of Counsel.

Filed this.....day of March, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

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The fifty-two alleged errors which have been assigned by the plaintiff in error are naturally divisible into two general divisions: first, those predicated upon the refusal of the trial court to exclude certain evidence offered by defendant-in-error, and second, those based upon the exclusion by the lower court of certain evidence offered by the plaintiff-in-error. The first division embraces the first six assignments of error and the second division the last forty-six assignments. Though counsel have

not urged, or even commented upon, any of the alleged errors in the first division we will discuss these assignments first and then take up the exceptions in the second division later.

Assignment No. 1 is based on the admission into evidence by the court of exemplified copies of Sections 1, 4 and 5 of Article 6 of the Constitution of the State of California and Section 1920 of the Civil Code of the State of California. Counsel's objection was the technical one that the certificate of the Secretary of State of the State of California merely certified these statutes to be in full force and effect on September 15, 1915, the date of the certificate, and that it could not be presumed that these statutes were in force prior to that date when the judgment was rendered and affirmed. It is not necessary to consider whether or not there is any merit in this technical objection for the testimony later of Ira D. Orton, a member of the bar of the State of California, established that these constitutional provisions and statute were in full force and effect prior to and at the time of the rendition and affirmance of the judgment. This testimony was not contradicted and no assignment of error concerning it has been made. If anything further were needed to meet this particular assignment of error, it might be pointed out that the trial court had the right to take judicial notice of the Constitution of the State of California and its public statutes and that this judicial knowledge includes the date when the statutes went into effect, when suspended or

repealed and the facts recited or recognized in the statute. And it might be added that the judicial knowledge of the United States Supreme Court and the United States Circuit Court of Appeals upon appellate review of a judgment or decree of a federal court is equally extensive.

16 Cyc., 890 and numerous cases cited;
Owings v. Hull, 9 Pet. (U. S.) 607, 625;
Gerling v. Baltimore etc. R. Co., 151 U. S. 673;
Barry v. Snowden, 106 Fed. 571;
Mills v. Green, 159 U. S. 651;
N. Y. Bank v. Franklyn, 120 U. S. 747;
Walnut v. Wade, 103 U. S. 683;
South Ottawa v. Perkins, 96 U. S. 260.

There was obviously no error in the admission by the court over counsel's objection of the judgment roll and remittitur to the Superior Court of the State of California, nor in the court's refusal to allow counsel to attack the jurisdiction of the California court prior to the introduction of the judgment roll. Indubitably the judgment roll was relevant, material and competent evidence and showed prima facie jurisdiction over the plaintiff in error by the California court. The findings of fact contained in the judgment roll recite that

> "W. S. Andrews, Esq., and A. H. Brandt, Esq., appeared as counsel for the plaintiff and Messrs. Fink & White appeared on behalf of the defendant. It appearing to the Court that the defendant had been regularly served with a copy of the summons and complaint in said

> cause, in the City and County of San Francisco, State of California, and that the defendant had duly appeared, by filing a demurrer and answer in said action and had not objected to the jurisdiction of said Court, the Court proceeded to hear said cause."

Without relying on the recitals in the judgment roll of service of process in California upon the plaintiff-in-error, it is the universal rule as counsel admit, that "where the record of a judgment of another state recites that the defendant appeared by attorney, this furnishes prima facie evidence that the appearance was authorized".

23 Cyc., 1581;
Brief of Plaintiff in Error, pages 41, 42;
Kline v. Ins. Co., 80 Wash. 608; 142 Pac. 7;
Williams v. Hirschfield, 122 Pac. 539;
Lawrence v. Jarvis, 32 Ill. 304;
Reber v. Wright, 68 Pa. St. 471.

The jurisdiction of the California court being prima facie established, the judgment roll was clearly relevant, competent and admissible. Further in refusing to permit counsel to introduce evidence to attack the jurisdiction and validity of the judgment roll during the case in chief of defendant-in-error the trial court was merely exercising its discretion and we submit was following the better practice. The proper time and place for counsel to offer such evidence was in the presentation of their own case.

38 Cyc., 1352, 1353.

The remaining assignments of error in the first division, numbered "4", "5" and "6" are as obviously untenable as those we have just considered. Counsel objected to the introduction into evidence of the exemplified copies of the notice of appeal from the judgment, the notice of appeal from the order denying a new trial, the order of the Supreme Court of the State of California transferring the appeal to the District Court of Appeal for hearing, and the orders of the District Court of Appeal affirming the judgment and order denying a new trial and denying a rehearing. The objection in each instance was that these records were incompetent, irrelevant and immaterial. If so, of course no harm resulted in their admission. But it is well settled law that a judgment is not admissible in evidence and that an action cannot be maintained on a judgment until it is final and under the law of both California and Alaska a judgment is not final and the action is still pending until the time to appeal from the judgment has expired or, if an appeal has been taken, until the judgment has been affirmed.

Cal. Code Civil Procedure, Sec. 1049;
Compiled Laws of Alaska, (1913) Sec. 1315;
Sewell v. Price, 164 Cal. 270.

It was therefore not only proper but necessary for defendant-in-error to show that though an appeal had been taken by plaintiff-in-error to the Supreme Court of California from the Superior Court of the City and County of San Francisco, that

after due and regular proceedings the judgment had been affirmed by the District Court of Appeal of California on August 7, 1914, and that the judgment was final at the date of the commencement of this action in the District Court of Alaska.

The remaining forty-six alleged errors are comprised in what we have denominated the second division of the assignment of errors and we believe have as little merit as those in the first division. These forty-six exceptions are again naturally divisible into two classes. The first class, which we shall call "Subdivision A", comprises those assignments of error based upon the exclusion by the trial court of evidence offered by plaintiff-in-error to show that the plaintiff-in-error at no time owned any property in California, nor was doing any business in that state, nor ever had appointed any agent in California with authority to accept process nor complied with the laws of California governing foreign corporations doing business in that state. The second class, which we shall call "Subdivision B", embraces those assignments of error predicated on the exclusion by the lower court of evidence offered by plaintiff-in-error to show that the board of directors of the Blue Goose Mining Company never authorized Messrs. Fink and White, attorneys at law, to represent and appear for plaintiff-in-error in the action brought in San Francisco by the Northern Light Mining Company against the Blue Goose Mining Company, nor that the board of directors ever authorized Jafet Lindeberg, their

president, to employ counsel to appear for the company in that action. "Subdivision A" embraces the assignments of error numbered 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 23, 24, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 49, 50, 51. "Subdivision B" is composed of the assignments of error numbered 12, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 32, 24, 44, 45, 46, 47, 48.

Counsel state in their brief (page 26) that

> "the position taken by the court below as shown by its ruling on the evidence, as being not competent, was that the judgment roll was conclusive on all recitals therein, including jurisdiction".

And again at page 51 in their brief counsel say that

> "the court below, as we have suggested, tried this case upon the theory that the record of the judgment of the California court imported absolute verity in all respects, including jurisdiction. Upon that theory only could it have given an instruction to the jury to return a verdict for the defendant in error, which instruction we also assign as reversible error. In fact we submit that the record in this case is a tissue of errors based upon the false theory of the case adopted by the court below upon the suggestion of the defendant in error."

With this conception of the theory upon which the lower court tried this case counsel have prosecuted this appeal and in their brief at page 22 state that the alleged errors of the trial court in ruling on the evidence

> "embrace two propositions of law, the answers to which we submit are controlling in this case.
>
> "First. Are the recitals in the record of a judgment obtained in a sister state against a foreign corporation conclusive, when sued upon in the domicile of the judgment debtor?
>
> "Second. Where an attorney professes to appear and represent such foreign corporation in defending such action, does that render the judgment binding upon it in the absence of service of process or may his lack of authority be shown in the subsequent action on such judgment?"

Counsel then devote all of their brief and concentrate all their efforts in establishing that by the weight of authority the first proposition must be answered in the negative and that as to the second of these propositions unquestionably the attorney's lack of authority may be shown.

We have no quarrel with counsel's statement of the law on these two propositions. We agree, and so did the trial court herein, with the statement made by Judge Andrews in Vilas v. Plattsburgh etc. R. R., 123 N. Y. 440 (quoted with approval by the United States Supreme Court in Cooper v. Newell, 173 U. S. 555, and by counsel at page 45 of their brief) that

> "it is well settled that in an action brought * * * on a judgment of a court of a sister state, the jurisdiction may be assailed by proof that the defendant was not served and did not appear in the action, or where an appearance was entered by an attorney that the appearance was unauthorized, and this even where the proof directly contradicts the record".

But though we agree with counsel's statement of the law covering the above two propositions we do not for a moment concede, as counsel say, that the answers to these propositions "are controlling in this case" (Br. p. 22), or that the trial court committed any error in any of its rulings.

There is nothing paradoxical in this position. The trouble is that counsel for plaintiff-in-error have an entirely erroneous conception of the rulings and theory of the trial court. They are laboring under the impression that the lower court ruled on the theory "that the judgment roll was conclusive on all recitals therein, including jurisdiction" (Br. p. 26). Nothing could be farther from the truth. The trial court directed a verdict for defendant-in-error because under well settled law, Jafet Lindeberg, the president of the Blue Goose Mining Company, *by virtue of his office,* had authority to employ counsel to defend the company in actions brought against it without any special authorization from the directors, and the evidence of witnesses for the plaintiff-in-error itself conclusively demonstrated that Lindeberg had not been forbidden by the directors to employ counsel to defend this or any action, but, on the contrary, with knowledge of his action obtained while the California case was still pending they had acquiesced in his employment of counsel and ratified it by either paying or permitting him to pay counsel for their services out of the funds of the company. Evidence offered by counsel to show that the California court

could not have acquired jurisdiction over plaintiff-in-error by process because it had never done business in California, was excluded because it was immaterial *as long as the California court had acquired jurisdiction by voluntary appearance.* And whatever evidence was excluded relating to the authorization of Messrs. Fink and White to appear tended to show only that the board of directors had not themselves employed Messrs. Fink and White or expressly authorized Lindeberg to do so. Plaintiff-in-error never offered any evidence to prove that *Lindeberg had been forbidden by the directors to employ counsel.* If Lindeberg had the implied authority *by virtue of his office* to employ counsel, the fact that the board of directors had not *expressly* authorized him so to do was obviously immaterial. Whatever evidence offered by plaintiff-in-error was rejected by the trial court was excluded, therefore, not because the judgment roll "imported absolute verity in all respects, including jurisdiction", but *because the evidence offered did not even tend to show that Lindeberg did not have the authority implied by law by virtue of his office to employ counsel and consequently did not even tend to rebut the presumption in favor of the California trial court's jurisdiction arising from the appearance by Messrs. Fink and White.* Hence counsel's dissertation on the effect to be given to the recitals in a foreign judgment, though interesting and in the main correct, is entirely inapposite on this appeal. We shall now turn our attention

to the forty-six assignments of error embraced in the Second Division (supra, p. 1) and shall devote our remaining space to showing that none of these assignments constitutes reversible error and that under the law and the facts the trial court was right in directing a verdict for the defendant-in-error.

Counsel took the position at the trial (Tr. p. 30) and have maintained it in their brief on this appeal (pp. 28, 40 and 41) that the judgment roll did not raise any presumption in favor of the jurisdiction of the California court by service of process because it does not appear affirmatively in the record that the Blue Goose Mining Company was engaged in business in California. They quote (Br. p. 40) from St. Clair v. Cox, 106 U. S. 350, in which it was said that

> "when service is made within the state upon an agent of a foreign corporation, it is essential in order to support the jurisdiction of the court to render a personal judgment that it should appear somewhere in the record * * * that the corporation was engaged in business in the state".

Counsel point out that in case

> "where the record of the judgment (as here) failed to show that the judgment debtor was doing business in the state where service was made on its agent, the record was held properly excluded" (Br. p. 40).

We do not question the correctness of the law as laid down in St. Clair v. Cox, supra. If the judg-

ment roll does not disclose that the Blue Goose Mining Company was engaged in business in California then the jurisdiction of the California court could only be presumed from the appearance of Messrs. Fink & White and counsel admit (Br. pp. 41, 42) that the record is conclusive as to the fact of their appearance and that such appearance is "prima facie evidence of their authority to act". While the judgment roll was admissible, therefore, because of the presumption or jurisdiction arising from counsel's appearance no presumption of jurisdiction could be predicated on the recital of service of process in the absence of a recital that the Blue Goose Mining Co. had been doing business in California. There being no presumption in favor of jurisdiction by service of process of what relevancy was any evidence offered plaintiff-in-error to show that jurisdiction had not and could not be had over it by service of process? Proof that the Blue Goose Mining Company, admitted to be an Alaskan corporation, had never owned any property in California, had never done any business in that state, had never designated an agent in California upon whom services of process could be made, and had never complied with the laws of California relating to foreign corporation doing business in that state, could only be admissible to show that under such circumstances no jurisdiction over the corporation could be obtained by the California court through service of summons upon any officer of the company. But when defendant-in-error offers no proof

of service by process and there is no presumption in favor of it, then clearly any evidence offered by plaintiff-in-error is irrelevant, for defendant-in-error is confined to the appearance by Messrs. Fink and White to support the jurisdiction of the California court and the validity of the judgment. On counsel's own contention that the judgment roll did not raise a presumption of jurisdiction by service of process the trial court was right in excluding testimony rebutting a presumption that did not exist. We can therefore disregard as without merit all the assignments of error relating to this phase of the case which together comprise "Subdivision A" (see supra, p. 7).

On the other hand, if counsel reverse themselves and argue that the record does disclose on its face that the Blue Goose Mining Company was doing business in California, and that therefore the recital in the findings that the Blue Goose Mining Company had been regularly served with summons does show prima facie jurisdiction in the California court by service of process, the result is practically the same. True under such construction of the record most of the evidence excluded and covered by the assignments forming "Subdivision A" (p. 7) would be relevant. But the exclusion of such testimony could at the most be called harmless error, unless plaintiff-in-error also overcame the other presumption and proved that Messrs. Fink and White had no authority to appear on its behalf. It is immaterial whether the California

court obtained jurisdiction over plaintiff-in-error by service of process or by its voluntary appearance. In either case the judgment is valid and plaintiff-in-error must prove that Messrs. Fink and White appeared without authority before it can claim reversible error in the exclusion by the trial court of proof that there was no valid service of process. Hence, whether or not the judgment roll imports prima facie jurisdiction by service of process none of the assignments embraced in "Subdivision A" (supra, p. 7) is reversible error and they can be disregarded.

However, before leaving entirely this phase of the case there is one contention made by counsel that might be noticed, though it seems utterly without merit. Apparently counsel would make Lindeberg's authority to employ counsel solely dependent on whether or not the Blue Goose Mining Company had owned property in California, had been doing business there and had designated him as the agent in California upon whom process could be served by the courts of that state. Counsel say:

> "We were, through the ruling of the court below, denied the right to show the lack of authority of J. Lindeberg to act as the agent of the Blue Goose Mining Company in the State of California, or to accept service of process or to appear and defend any action in its behalf. We were denied the right by the rulings of the court below to show that the Blue Goose Mining Company did not hold property in the State of California.
>
> * * * It would seem to require no argument that if Lindeberg was not such a person

> upon whom process could be served, or who could accept service or appear in such action on behalf of the Blue Goose Mining Company * * * then he would have no authority to employ attorneys. * * *"

We seldom have met a more sophistical argument or a more complete *non-sequitur*. Let us assume that the Blue Goose Mining Company never did engage in any business in California, nor ever owned any property there, nor ever designated Lindeberg or any one else as a person upon whom service of process could be made as required of foreign corporations in California by Section 405 of the Civil Code. Will counsel argue that under such circumstances the Blue Goose Mining Company could not, if it so desired, voluntarily appear in an action pending against it in California? Could not the board of directors by resolution regularly adopted authorize and direct its president, Jafet Lindeberg, to employ counsel to appear on behalf of the corporation in that action? Obviously, yes. Yet the corporation would not be doing any business in the state or owning any property there, nor would Lindeberg be an agent designated to accept service by process pursuant to Section 405 of the California Civil Code. And if Lindeberg could have such authority by express resolution of the board of directors could he also not have it, in the absence of any resolution of the board to the contrary, if the law clothed him with it by virtue of his office? And even though he did not

have the implied authority to employ counsel could not the board of directors by acquiescence after knowledge or by paying the attorneys for their services approve and ratify the act of their president?

Clearly the trial court was right in taking the position that whether or not the plaintiff-in-error was engaged in business in California or had designated an agent there upon whom service of process could be made was a matter that had no material place in this case. The lower court admitted the judgment roll because the presumed authority in Messrs. Fink and White to appear gave the California court prima facie jurisdiction. Unless that presumption was overcome judgment would have to go for defendant-in-error. And while proof that the Blue Goose Mining Company had never done business in California nor owned property there, nor designated an agent there to accept process might overcome a presumption in favor of jurisdiction by *service of process* it could not derogate from the implied authority and power to employ counsel with which the trial court held the law had invested Lindeberg by virtue of his office as president and general manager.

Since the assignments grouped under "Subdivision A" should be totally disregarded as concerning irrelevant and immaterial issues, we shall now turn our attention to the remainder of the assignments of error which we have classified as "Subdivision B". These assignments are those numbered

12, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 32, 34, 44, 45, 46, 47 and 48 (see supra, p. 7). They relate to excluded evidence offered by plaintiff-in-error to prove that the board of directors of the Blue Goose Mining Company had never themselves employed Messrs. Fink and White, nor had ever authorized Jofet Lindeberg to employ any attorney to appear for plaintiff-in-error in the action pending against it in California. This evidence had been offered pursuant to counsel's theory that Jofet Lindeberg, as president of the corporation, had no authority to employ counsel unless expressly authorized to do so by the board of directors.

It will be apparent from a cursory examination of these assignments that the interrogatories covered by most of them were incompetent. The court, for instance, sustained objections to the following question put to Jofet Lindeberg (Assignment No. 46, Tr. p. 155):

> "Had you any authority from the defendant *as President or otherwise,* to appear in the action brought by the plaintiff herein in the State Courts of California, or to employ counsel therein to defend such action?"

Obviously this question is improper as it calls for the conclusion of the witness and indeed his opinion on a question of law. And it will be found that the questions involved in assignments numbered 12, 20, 25, 28, 32, 34, 44, 45, 46, 47 and 48, merely reiterate the above question in practically the same language and are all subject to the same vice.

The remaining assignments numbered 18, 21, 22, 26 and 29, all relate to the same matter and are repetitions, in about the same form, of the question covered by Assignment No. 21:

> "Q. Since you have been a member of the board of directors did the board of directors authorize the employment at any time of Messrs. Fink and White or other counsel to represent the defendant or appear for the defendant in the case in question?" (Tr. 131.)

By this question and the similar ones involved in the other above enumerated assignments counsel endeavored to show that the board of directors had not by any *express* resolution authorized Lindeberg or anyone else to employ Messrs. Fink and White. These questions, outside of other grounds, were objectionable as not calling for the best evidence which was available. Counsel for defendant-in-error repeatedly objected to these questions on that ground and the objection was sustained (Tr. pp. 133, 147). Indeed Mr. Stevenson, secretary of the Blue Goose Mining Company, testified:

> "Nothing was brought up at our meetings except what is shown in the minutes, there was nothing orally transacted."

In face of such testimony clearly the minutes were the best evidence and the objections to the questions were properly sustained.

Furthermore, these questions were irrelevant and immaterial. As we shall establish hereafter, Lindeberg by virtue of his office as president and his authority as the "general executive officer of the

corporation" (Tr. p. 126) had the power and authority to employ counsel to defend actions brought against the company unless forbidden to do so by the directors. But he did not need their express authorization to clothe him with that power for it was already implied. As said by the court in a similar case—Beebe v. Beebe Co., 46 Atl. 169:

> "The suggestion that it requires a resolution of the board of directors to authorize an attorney to represent a corporation in our courts is equally unsubstantial. The president, as the chief executive officer of a corporation, has authority virtute officii, to take all steps necessary for the defense of his company in litigation in which it may be involved, including the employment of an attorney for this purpose. Not even a suggestion to the contrary can be found in the books."

Proof that the board of directors had expressly forbidden such employment by the president would be pertinent, but the fact that the directors had not expressly directed him to employ counsel clearly could not derogate from the implied power to engage attorneys belonging to him as the "general executive officer of the corporation" (By-Laws, Sec. 3, Tr. p. 126).

But even though the evidence involved in and covered by the above assignments (subdivision B) were competent and relevant no harm has been done by its exclusion. As previously stated by these questions counsel sought to establish that the board of directors had not expressly authorized Lindeberg to employ counsel to appear in the action pending in California. But counsel for

plaintiff-in-error were permitted to introduce into evidence the minutes of the board of directors which failed to disclose any action by the board of directors relating to the action in California or the employment of counsel therein. In view of the testimony of Mr. Stevenson (supra p. 18) that the minutes showed everything that the directors had done, if any of the rulings complained of in the above assignments (subdivision B) were incorrect (which we do not believe) they were cured by the admission of the minutes in evidence.

We now come to the last and most important question. Was the trial court justified in directing a verdict for defendant-in-error? In discussing this question we shall try to look at the case for plaintiff-in-error in its strongest and most favorable light. Let us assume, as counsel has consistently maintained, that there is no presumption or proof that the California court ever acquired jurisdiction over the plaintiff-in-error by service of process and that the validity of the judgment roll depends on the authority of Messrs. Fink and White to appear in the action. Let us also assume that the board of directors of the Blue Goose Mining Company never expressly authorized or directed Lindeberg to employ counsel or to appear and defend in the action in California. It may also be assumed that the directors Bachelder, Cole, Stevenson and Lomen did not know of the pending action in California prior to March 22, 1912, the date in which judgment was entered in the Superior Court. Assuming all these facts in favor of plaintiff-in-error, was the directed verdict justified?

It is our contention that the lower court was right in directing a verdict for the following reasons: First, that under the law Jafet Lindeberg, as president, had the authority by virtue of his office and without express authorization from the board of directors to employ counsel and defend the action; second, that even if this court thinks that he did not have such authority merely by virtue of his office as president alone, that the evidence shows that Lindeberg was also the "chief executive officer", the general manager of the corporation, and as such is universally held under the law to be clothed with the implied power, without express grant from the directors, of defending actions and employing counsel for that purpose; third, that the plaintiff-in-error and its directors are estopped from questioning the authority of Lindeberg to employ Messrs Fink and White because the evidence shows conclusively that after hearing and knowing about the action in California While It Was Still Pending and of the action of their president in employing and authorizing Messrs. Fink and White to appear therein, they not only acquiesced in the proceeding but even paid these attorneys for their services out of the funds of the Blue Goose Mining Company. We will take these propositions up in their order.

We are aware that a number of authorities hold that the office of president itself confers no power to bind the corporation or control its property. However, as said by Machen in his leading work on corporations (section 1668),

> "many authorities, on the other hand, *which are constantly increasing in number,* hold that he has presumptively by virtue of his position a general right of superintendence over the company's affairs in the interim between meetings of the board of directors, and that his powers are presumptively those of a general manager of the business".

The general trend of the authorities is toward a liberal construction as to the powers held by a president by virtue of his office. But no matter how the cases may differ as to the powers incidental to the office of president we believe that the power to defend actions against the corporation and employ counsel to that end is peculiarly inherent and characteristic of the office of president of a corporation.

Mr. Morse in his well known work on Banks and Banking (section 143), speaking on this very matter, says:

> "Indeed, it is a singular fact that the entire collection of judicial authorities justifies the enunciation of only one act as falling within the properly inherent power of the president. This solitary function is to take charge of the litigation of the bank. There is no question that this matter belongs to him by virtue of his office. * * * He may appear, answer and defend in suits against the bank."

Nor is there anything peculiar to the office of presidency of a bank, as the court says in Pacific Bank v. Stone, 121 Cal. 202, in speaking of this very quotation from Morse that should prevent the

above statement being applicable to the office of president of other corporations.

In Streeten v. Robinson, 102 Cal. 545, the court said that "the authority of the president, or other head of a corporation, to employ an attorney where the exigencies of his company require it has been repeatedly recognized".

Again in Winfield Mortgage and Trust Co. v. Robinson, 132 Pac. 979, it was said:

> "In the absence of a contrary corporate provision, the president is empowered to employ counsel and to manage the litigation in which the corporation is interested. This is said to be one of the inherent powers of a president of a corporation, and it has also been held that, if the board of directors should employ counsel, it would not deprive the president of the power to employ other counsel and control the litigation."

It appears from the foregoing authorities that Jafet Lindeberg, as president of the Blue Goose Mining Company, had the implied power to authorize and employ Messrs. Fink and White to appear in the action in California without any special authorization from the directors. But in this case we are not limited merely to the powers inherent in the president of a corporation. The undisputed evidence establishes that Jafet Lindeberg in addition to being the president of the Blue Goose Mining Company was the "general executive officer of the corporation", its general agent or general manager, and indeed absolutely dominated the company. The right of Lindeberg

to prosecute or defend suits for the corporation, without express authorization from the directors, is under such circumstances well established.

10 Cyc., 928.

In their brief counsel have quoted from the by-laws in support of their contentions, though the by-laws were not admitted in evidence. And that the trial court was right in excluding the by-laws is so well settled as to require little citation of authority.

10 Cyc., 351, 352, 925, and cases cited.

However, since counsel has treated the by-laws as though they were in evidence we will do the same. We cannot understand how counsel can rely upon these by-laws as showing no authority in the president to employ counsel. To us they conclusively establish the fact that Lindeberg was the general agent, manager and executive officer of the corporation. The by-laws provide:

> "*The president shall be the general executive officer of the corporation.* He shall preside at all meetings of the directors and stockholders, shall prepare and present at each annual stockholders' meeting a report of the business of the corporation for the preceding year, and a statement of its present condition, *shall sign all stock certificates and written contracts of the corporation, and perform generally all the duties usually appertaining to the offices of president of a corporation.* He Shall Have General Charge (subject to the control of the board of directors) of the Business Affairs of the Corporation, *may sign and endorse bonds, bills, checks and promis-*

> *sory notes on behalf of the corporation, and may borrow money in its name;* but he shall have no power without the previous consent of the board of directors to incur any debt on behalf of the corporation in excess of the sum of five hundred dollars, or without such consent to bind the corporation by any obligation involving a liability in excess of said sum. He shall at all times keep the directors advised as to the affairs of the corporation."

We could ask for no better proof of the fact that Lindeberg was the general agent and executive officer of the company than this by-law. Counsel says (Br. p. 50): "It will be seen that he is to 'have general charge *(subject to the control of the board of directors)* of the *business affairs* of the corporation'. And it is expressly provided that 'he shall have no power *without* the *previous consent* of the board of directors to incur *any debt on behalf of the corporation in excess* of the sum of *five hundred dollars,* or *without such consent,* to *bind* the corporation *by any obligation involving* a liability *in excess* of such sum'."

Counsel seem to get comfort in the parts of this by-law which they have italicized, but we can see little help to them there. They argue that "while he (Lindeberg) had *general charge* of the business of the corporation such charge was *subject to the control* of the board of directors". Is it not true that every general agent, no matter how wide and extensive his powers may be, is subject to the control of the directors? And until the directors

exercise this control, has not Lindeberg, as president, the general charge and management of the business? And have not counsel by putting the minutes into evidence proved that the board of directors never did exercise any control or forbid Lindeberg from defending suits and employing attorneys? As for the provision in the by-laws limiting the president's power to incur indebtedness to five hundred dollars, of what comfort or pertinency is that since the fee of Fink and White amounting to one thousand dollars HAS BEEN PAID *from funds of the corporation with the consent of the directors?* (Tr. p. 159.)

We submit that this by-law conclusively shows Lindeberg was both president and general manager of the corporation. Indeed the power given to him to execute "bonds, bills, checks and promissory notes on behalf of the corporation" is a greater power than is usually given to general agents of corporations. As stated in 10 Cyc. 929: "Generally speaking the managing agent of a corporation, other than the cashier of a bank, has no implied power to bind the corporation by making, accepting, or indorsing negotiable paper." Yet Lindeberg had this authority and in addition could borrow money, execute written contracts of the corporation, preside over corporate meetings, could perform all duties usually appertaining to the office of president of a corporation, was the general executive officer of the company with general charge of the business affairs of the corporation. It is

difficult to think of any power usually held by a general agent and manager that was not granted to the president by these by-laws.

If anything further were needed to show the general authority and extensive powers held up Lindeberg it can be found in the way the company has been conducted. Less than 300,000 shares out of a total capital stock of 500,000 shares in the Blue Goose Mining Company have been issued (Tr. p. 150). Of these 300,000 shares 156,656 stood in the name of Lindeberg so that he controlled the corporation (Tr. p. 139). Of the remaining directors, Stevenson, Bachelder and Lomen each held 10 shares and Cole had 18,750 shares (Tr. p. 143). Apparently Lindeberg absolutely dominated and dominates the directorate. He has been the president of the company continuously since August, 1910 (Tr. p. 112). Stevenson is in the employ of the Blue Goose Mining Company (Tr. p. 137), Lomen is its attorney and Bachelder is employed in the summer time, at least, by the Pioneer Mining Company of which Lindeberg is the president (Tr. p. 105). The business of the corporation has been left entirely in Lindeberg's hands as is obvious from the fact that between August 1, 1910, and October 21, 1912, only one directors' meeting was held and at that meeting on September 27, 1911, nothing was done but electing officers for the ensuing year. The Blue Goose Mining Company was run as a sort of subsidiary to the Pioneer Mining Company of which Lindeberg is the chief

officer (Tr. p. 159). Lindeberg testified that he held his 155,656 shares in the Blue Goose Mining Company as trustee for the Pioneer Mining Company. Even the books of the Blue Goose Mining Company were kept by an employe of the Pioneer Company (Tr. p. 107). And what could be more illuminative as to the control and power exercised by Lindeberg over the Blue Goose Mining Company than the following extract from his testimony on cross-examination:

"Q. And you paid them (Fink and White), did you?

A. I have paid them, yes, sir.

Q. Out of your own funds, or the Blue Goose Mining Company's funds?

A. I think I paid them out of the Pioneer Mining Company's funds to begin with.

Q. And charged it up to the Blue Goose Mining Company, of course?

A. I think so, yes, sir.

Q. So the Blue Goose Mining Company really paid counsel?

A. I think so, yes, sir.

Q. A thousand dollars at one time?

A. I believe that was charged to the Blue Goose Mining Company either in 1914 or 1915, if I remember right.

Q. Well, a thousand dollars at one time you paid them?

A. I think that was the fee.

Q. The Pioneer Mining Company paid it of which you were the chief officer, and you afterwards charged it to the Blue Goose Mining Company?

A. I think that was the way it was done. The books will show it."

We submit that with these by-laws and this evidence before us, there can be but one conclusion and that is that Jafet Lindeberg has been since August, 1910, not only the president of the Blue Goose Mining Company but also its general and managing agent.

The law is well established that "managing officers and agents of corporations have power to employ attorneys and counselors to prosecute or defend suits for the corporation, or otherwise to assist in legal proceedings in which it is interested, without any express delegation of power so to do, or any formal resolution of the board of directors to that effect".

10 Cyc., 928;
Luce v. San Diego Land Co. (Cal.), 37 Pac. 390;
American Ins. Co. v. Oakley, 9 Paige (N. Y.) 496; 38 Am. Dec. 561;
Southgate v. Atlantic R. Co., 61 Mo. 89;
Western Bank v. Gilstrap, 45 Mo. 419;
Lewis v. Pulitzer Pub. Co., 77 Mo. App. 434;
Mumford v. Hawkins, 5 Den. (N. Y.) 355;
Dallas Ice Factory Co. v. Crawford, 44 S. W. 875;
R. Co. v. Ackerman, 59 S. E. 10;
Beebe v. Beebe Co., 46 Atl. 169.

Many more cases to the same effect and statements by leading writers could be produced but the law is so well established on this proposition as not to require exhaustive citation of authority.

We believe we have demonstrated that Jafet Lindeberg was the president and general manager and executive officer of the Blue Goose Mining Company and as such possessed of authority to defend the action in California without express authorization from the board of directors.

But even assuming that Jafet Lindeberg did not have the power to employ counsel without the express authority of the directors, the evidence shows, we think, that the plaintiff-in-error is estopped from now questioning his authority and, indeed, shows that the directors ratified his act.

There is one interesting and curious coincidence about the testimony of the directors of the Blue Goose Mining Company relating to the time when they first heard of the action in California. All without exception could not place the date with any degree of accuracy but they were all certain that it was after March 22, 1912, when the judgment was entered in the Superior Court in California. We have put from our mind as unworthy the thought that perhaps the dictum in Citizens Bank v. Brooks, 23 Fed. 21, cited by counsel, that ratification after judgment may be ineffective, had refreshed the memories of the directors as to this date. Apparently, at any rate, they all learned about it shortly after the judgment was rendered. Mr. Cole says he knew about it in the fall of 1912 (Tr. p. 113); Mr. Lomen says he first learned of the case in the summer of 1912 (Tr. p. 129); Mr. Stevenson says he did not hear of it prior

to March 22, 1912 (Tr. p. 147) but tells us nothing more definite; and Mr. Bachelder's testimony is to the same effect.

Now under the law of California and Alaska a judgment is not final and the action is deemed to be pending until the time for appeal has expired, or, if an appeal has been taken, until the judgment has been affirmed (supra p. 5).

Cal. Code Civil Proc., Sec. 1049.
Compiled Laws of Alaska (1913), Sec. 1315.
Sewell v. Price, 164 Cal. 270.

An appeal having been taken from the judgment of the Superior Court, as shown by the judgment roll, the action was pending until the judgment was finally affirmed in October, 1914.

By their own admissions the directors of the Blue Goose Mining Company knew of the action pending in California at least two years before the judgment was affirmed by the appellate court and while the appeal was still undecided. During these two years did the directors call upon Lindeberg to account for his unauthorized and inexcusable act in voluntarily appearing on behalf of the corporation in the California case? One would naturally expect some such action from the indignant directors. But strange to say nothing was done. As Mr. Cole testifies "the matter of this suit was never brought up at any time before the directors at their meetings". He knew about the case "in the fall of 1912 and went to the meet-

ings of the stockholders each meeting and did not say anything about this suit".

Now of course a judgment of $15,000 may not seem large to some corporations, but it is difficult to reconcile the apparent serenity of the directors to this adverse judgment with the anger and indignation that would be expected to dominate them on hearing of the unauthorized act of Lindeberg and its result. Since G. J. Lomen, the general counsel, was also a director, it would seem reasonable to suppose that he would have advised the directors that the appearance of Fink and White was unauthorized and that the California court never acquired jurisdiction. If Lindeberg exceeded his authority in defending the California case that fact was surely as well known in 1912 as it was in 1916. And would it not be right to expect that the directors, acting in good faith, as soon as they learned of the unauthorized act of their president, would in the interest of themselves and their stockholders,—not to speak of the California courts and the defendant-in-error who had also been imposed upon—at once specially appear in the California courts and move to vacate the judgment for lack of jurisdiction.

But nothing of the sort was done. The directors preferred to adopt a policy of "watchful waiting". If the appellate court reversed the judgment as no doubt the directors on the advice of their counsel expected, then all was well. If not,—then there would still be an opportunity to raise the point

on any suit on the judgment in Alaska. Whether it was in pursuance of this apparent policy that the method of paying the fee of Fink and White testified to by Lindeberg (supra p. 159) was adopted, of course, we do not know. It certainly looks suspicious that the fee should be paid by the Pioneer Mining Company and not charged to the Blue Goose Company until 1914.

Plaintiff-in-error cannot escape the fact that its payment of the fee charged by Fink and White was a ratification of the employment, even assuming it was originally unauthorized. The proposition is too plain for argument. And it cannot be said that the directors did not know of or acquiesce in the payment of this fee for the evidence shows that the books of the company disclose the payment (Tr. p. 159). And it must be presumed that the directors were doing their duty and keeping track of the corporation's business.

Nor can the time of the payment of this fee make any difference as long as the ratification took place, as it did, prior to the commencement of this action. Lindeberg stated that the fee was charged to the Blue Goose Mining Company in 1914 or 1915, though actually paid to Fink and White before that. There is nothing to show whether the fee was paid before or after the affirmance of the judgment in October, 1914. But in either event the result is the same. Even though the appearance of counsel was entirely unauthorized, the acceptance of the benefit of their services

and the payment by the company of a fee for the same, even though paid after judgment entered, would confirm the jurisdiction and validate the judgment.

Ryan v. Doyle, 31 Iowa 53;
Robb v. Vos, 155 U. S. 13;
Mass. Const. Co. v. Kidd, 142 Fed. 285.

Further, plaintiff-in-error is estopped from now questioning the authority of Lindeberg to employ counsel and defend the California action. The testimony of the directors themselves established that they became aware of the litigation in California while it was still pending, and indeed two years before the judgment became final. They took no action to terminate the employment but allowed Fink and White to continue to represent the corporation in the California appellate court and to write and file briefs in the case in that court. They even had Messrs. Metsom, Drew and Mackenzie, who appear as "of counsel" for plaintiff-in-error herein file a petition for rehearing on August 27, 1914, in the District Court of Appeal. And thus new counsel was brought into the case in 1914. For two years plaintiff-in-error permitted Fink and White to innocently continue perpetrating a fraud on the appellate court by appearing for a party without authority. They permitted defendant-in-error to go to great expense in the employment of counsel and the usual costs of an appeal and they permitted the appellate court to devote time and labor in consideration of an appeal

from an apparently valid judgment. During an interim of two years and more they took no steps to disavow the alleged unauthorized act of their president. They quietly waited to see if the judgment would be reversed. And now in this action for the first time they claim that Lindeberg had no authority to appear and that the judgment is void. The law will not permit such practice and has uniformly declared that under such circumstances the corporation will be estopped from denying the authority of its officer and agent.

In Salem Iron Co. v. Lake Superior Consol. Iron Mines, 112 Fed. Rep. 239, the court laid down the law as follows:

> "Moreover, if a contract within the power of that corporation to make * * * be made by the president or an executive committee, assuming to act for the company, but without express authority to so contract, it is the duty of the directors of the company, upon receiving notice of such contract having been made, to promptly disavow the same as binding upon the corporation; and, in case they fail to do so within a reasonable time, the law will hold them to have ratified the contract, and allow it to then become binding upon the company. The law does not * * * permit a delay * * * to enable the company to speculate upon the chances of deciding profitably, after a lapse of time, as to whether or not they will disavow and refuse to accept the contract."

See also

Brown v. Crown Gold Milling Co. (Cal.), 89 Pac. 86;

De Forest v. Northwest Townsite Co., 84 Atl. 674;

Wehrung v. Portland Country Club etc., 120 Pac. 747, and see 10 Cyc. p. 913 and cases cited.

In conclusion we believe that all of the assignments of error presented by plaintiff-in-error are without merit. We think that the trial court instead of trying the case upon a false theory, as charged, properly excluded the evidence that related, as we have shown, to irrelevant and immaterial issues. The evidence certainly demonstrates that Lindeberg was not only the president but also the general manager and executive officer of the corporation and as such under the law he unquestionably had the authority to engage counsel and appear and defend in the action in California on behalf of plaintiff-in-error. And even though it be assumed in face of all evidence to the contrary that Lindeberg exceeded his authority, still it has been proven out of the mouths of the president and directors themselves that the plaintiff-in-error knowingly allowed Fink and White to represent them in the action pending in California for two years without making any effort to disavow the act of the president in employing them but on the contrary paid these attorneys a fee of $1000 for their services. We submit that this appeal is without merit and that as a proper decision in this case the language in the following opinion rendered *by this court* in the case of Owyhee Land

and Irr. Co. v. Tautphas, 121 Fed. Rep. 343, could well be used:

Ross, Circuit Judge: "There is no merit in this appeal. * * * A corporation, on whose behalf a contract has been executed by its president, cannot be allowed to question its validity after its full performance by the other party thereto, the acceptance of its benefit, and repeated recognition of its binding character by the payment by the corporation of a large part of the consideration for the work done thereunder. Such acts constitute a complete ratification, even if the contract was originally unauthorized. * * * The *judgment is affirmed with 10 per cent thereon as damages for frivolous appeal.*"

Dated, San Francisco,
March 3, 1917.

Respectfully submitted,

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